

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.**

CRIMINAL APPEAL NO. 517 OF 2000

Mohan Subhash Biranje Appellant.

versus

The State of Maharashtra Respondents.

.....

Mrs. P.P. Kakade for the appellant -appointed.
Mrs. P.H..Kantharia APP for the State.

.....

**CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.**

DATED; 7TH OCTOBER, 2004.

ORAL JUDGMENT (Per Palshikar, J.);

1. Being aggrieved by the the order of conviction passed by the 3rd Additional Sessions Judge, Kolhapur in Sessions Case No. 25 of 1999 under sections 302, 498-A, of IPC on 24-11-1999 the appellant has preferred this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us.

2. With the assistance of the learned counsel for the accused and the learned Prosecutor, we have scrutinised the records of the case and re-appreciated the evidence on record.

3. The prosecution story stated briefly is that the accused was married to deceased Lata and had three children out of this wedlock. The accused was addicted to alcohol and was torturing his wife. On 23rd July 1998 around 5.00 p.m. the accused repeated his cruel behaviour of 22nd July 1998, abused and threatened his wife, took kerosene and poured it on his wife and put her on fire, as a result of which she sustained burn injury and was admitted to the hospital and after giving statements to the police and the Executive Magistrate, she died. The accused was prosecuted for committing murder of his wife. The prosecution has examined as many as 12 witnesses to prove its case that the homicidal death of Lata was intentionally done by the accused and therefore he was guilty under section 302 of IPC. The learned trial Judge on appreciation of this evidence came to the conclusion of guilt and convicted the accused as aforesaid.

4. The learned advocate appearing on behalf of the accused contended that the order of conviction is unsustainable in law because there is no conclusive evidence on record that it was the accused who was committed the act. Pointing out the two dying

declarations existing on record it was contended that there are material discrepancies in these declarations and therefore the correct and truthful picture as to what exactly transpired on 23rd July has not come forth. In such circumstances, according to the learned counsel conviction is unsustainable. She therefore prayed for acquittal.

5. Relying on this very dying declarations the learned A.P.P. pointed out that the contradictions if any are not material and that the dying declarations are substantially proved by the witnesses in whose presence the same was made and there is no reason to interfere with the order of conviction.

6. The total evidence consists of 12 witnesses. P.w.1 Ashok is the panch witness who proves the panchanama by which the burnt clothes was seized which was smelling of kerosene and the floor also smells of kerosene. P.w.2 Malan is the step mother of victim Lata and has deposed that the accused always suspected the character of his wife and that the victim told this witness that the accused poured kerosene and put her on fire. According to this witness there was therefore immediate

disclosure of the occurrence by the victim to this witness and therefore there is direct substantial evidence connecting the accused to the crime. P.ws. 3,4 and 5 are turned hostile and therefore their evidence is inconsequential. P.w.6 Anandarao is ASI who was told by the victim that she was burnt by the accused. P.w.7 Janardan is the police constable who took the seized articles to the Chemical Analyser. P.w.8 Dr. Shivaji is the person who examined the victim, when she was admitted to the hospital and has deposed that the victim has disclosed to him that she was burnt by her husband by pouring kerosene.

7. P.w.9 is Special Executive Magistrate Suresh Baburao who recorded the dying declaration of the victim at the instance of the police. P.w.10 Abdul is the Head constable who informed the Special Executive Magistrate to come and record the statement of the victim. P.w.11 is Dr. Sanjay Deshpande who was present when the Special Executive Magistrate recorded the dying declaration of the victim. He has deposed that the victim was through out the recording of the statement conscious and was in a good state of health, and she could reasonably giving replies to the questions asked. He has proved the endorsement made by

him on the declaration recorded by the SEM. P.w.12 Shivaji is the investigating officer. It is thus be seen that both the dying declarations are duly proved and it was relying on these two dying declarations that the conviction was recorded by the learned trial Judge.

8. As desired by the learned counsel appeared on behalf of the accused, we have scrutinised Exh.35 the first statement recorded by the police officer. This Exh.35 bears a clear endorsement by the doctor who was the medical officer of class II, that the patient was fully conscious and was in a position to give her statement. The endorsement further mentions that the statement is recorded in presence of the doctor. It mentions that the witness offered the statement as recorded and has noticed it was so recorded in presence of the doctor, who proves the endorsement made on the statement. In this Exh.35 the victim has very clearly stated that the accused poured kerosene on her, threw burning match stick on her and ran away. She mentions where she was burnt, she mentions that she cried and was admitted in the hospital. She also mentions that she was under treatment and was fully conscious. She repeats her statement that it was her husband alone who had put her on fire.

9. We have to consider this Exh.35 and has to compare it with Exh.38, which was recorded by the Special Executive Magistrate. Exh.38 has recorded later in point of time than Exh.35 which also bears the endorsement of the doctor. The endorsement is that the patient is fully conscious, pulse is 84 per minute, volume of voice is good and regular and patient is in a state to give statement. Therefore the endorsement is complete in all respects and is as required by law. This statement is recorded in question and answer form. It bears the statement by Magistrate that after ascertaining that the patient was in a conscious condition and obtaining certificate to that effect that it was recorded in question and answer form. In this statement also there is unequivocal statement of the victim that it was her husband who threw kerosene on her and put her on fire. At the end of the statement there is again a declaration by the doctor that the patient was through out fully conscious. There is thus no inconsistency on any material point between Exh.35 and 38. However the learned counsel relied on Exh.35 and pointed out that this declaration substantially gives the cause that the husband used to quarrel with the wife because he was often going out of the house and such a statement is wholly absent in Exh.38.

According to the learned counsel therefore the material statement as regards the cause of causing death is absent in Exh. 38, whereas it is there in Exh.35. According to the learned counsel therefore the dying declarations are not liable to be accepted. In Exh.35 according to her she has specially mentions about the addiction of her husband to liquor. There is no such mention about it in Exh.38. Therefore, according to the learned counsel there is serious collusion in Exh.38 and Exh.35 and therefore reasonably a doubt is created as to which of the statement is true. We are unable to accept this contention for the reason that in both the declarations, the material fact that accused is the person who has committed the crime is unequivocally stated. The fact that the accused was addicted to liquor is proved, even otherwise, by ample evidence on record. In such circumstances, there is no error committed by the learned trial Judge in convicting the accused on the basis of these two statements which are duly proved by the persons and the doctor who certified that at the relevant time on both the occasions the victim was in a condition to make the statement. Therefore the declarations are rightly accepted.

10. In the result, therefore, the appeal fails and it is dismissed.

11. The fees quantified to the learned counsel appointed for the accused and the learned A.P.P. is Rs. 1000/- for this appeal.

XXXX